Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-126

BARRY SIGAL, a/k/a Barry Edwards, a/k/a David Allen Spector,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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INDEX

	PAGE
I. Opinions Delivered in the Courts Below	1
II. Jurisdictional Statement	2
III. Questions Presented	2
IV. Constitutional Provisions and Statutes Involved	2
V. Statement of the Case	3
VI. Statement of Facts Relevant to the Issues Presented for Review	5
VII. Reasons Relied Upon for Allowance of Writ ..	6
VIII. Conclusion	30
Appendix	
A—Table of Amendments to the United States Constitution Cited	1a
B—Table of Statute Cited	3a
C—Opinion of the United States Court of Appeals	4a
D—Order of the United States District Court ..	15a

TABLE OF AUTHORITIES

Cases

Agnello v. United States, 269 U.S. 20 ..... 11, 12
Aguilar v. Texas, 378 U.S. 108 12
Brinegar v. United States, 338 U.S. 160 ..... 8, 21

PAGE

Carroll v. United States, 267 U.S. 132 ..... 7, 8, 10, 16, 18, 19, 20, 21
Chambers v. Maroney, 399 U.S. 42 ..... 17, 18, 19, 23, 24, 25, 26
Chapman v. United States, 365 U.S. 610 .....12, 13, 24
Chimel v. Cal., 395 U.S. 752 ..... 13, 21
Coolidge v. New Hampshire, 403 U.S. 443 ..... 17, 18, 20, 23, 24, 25

Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 .. 23

Harris v. United States, 331 U.S. 145 ..... 10, 16
Hart v. United States, 162 F.2d 74 9
Henry v. United States, 361 U.S. 98 9
Husty v. United States, 282 U.S. 694 9

Johnson v. United States, 333 U.S. 10 ..... 13, 24
Jones v. United States, 357 U.S. 493 24

Katz v. United States, 389 U.S. 347 ..... 12, 18, 20

Mapp v. Ohio, 367 U.S. 643 24
McDonald v. United States, 335 U.S. 451 ..... 13, 15, 24

People v. Zeigler, 100 N.W. 2d 456 7

Rent v. United States, 209 F.2d 893 9

Schmerber v. Cal., 384 U.S. 757 13
Silverthorne Lumber Co. v. United States, 251 U.S. 385 13

Taylor v. United States, 286 U.S. 1 ..... 10, 11, 16, 24
Trupiano v. United States, 334 U.S. 699 24

United States v. Anderson, 468 F.2d 280 ..... 17, 18
United States v. Jeffers, 342 U.S. 48 ..... 13, 15
United States v. Kidd, 153 F. Supp. 605 9
United States v. Lefkowitz, 285 U.S. 452 11
United States v. Lewis, 270 F. Supp. 807 ..... 10, 16

PAGE

United States v. McCormick, 468 F.2d 68 ..... 17, 18
United States v. Miller, 460 F.2d 582 ..... 17, 18
United States v. Payne, 429 F.2d 169 21
United States v. Stoffey, 279 F.2d 924 9

Vale v. United States, 399 U.S. 30 ..... 12, 13, 26

Warden v. Hayden, 387 U.S. 287 13
Wong Sun v. United States, 371 U.S. 471 13

Zap v. United States, 328 U.S. 624 13

Statute

21 U.S.C. 841(a)(1) 3

United States Constitution

Fourth Amendment 2, 10, 26, 29, 30

Fifth Amendment 2, 26, 30

Sixth Amendment 3, 26, 30

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To: *The Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States.*

This is a petition by petitioner-appellant Barry Sigal, by his attorney Robert I. Kalina, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit Court, entered in the above case.

I. Opinions Delivered In Courts Below

The United States District Court did not write an opinion, except for an order denying Appellant's motion to suppress evidence, which is appended to this petition. The written opinion of the United States Court of Appeals for the Tenth Circuit has not been officially reported at this time, but a copy of the Tenth Circuit Court's opinion is appended to this petition.

II. Jurisdictional Statement

The date of the judgment sought to be reviewed is July 17, 1974 and was entered on the same date. This petition is being filed within thirty (30) days of said judgment. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U.S.C. 1254 (1).

III. Questions Presented

The questions presented for review are as follows:

1. Did the Court of Appeals err in failing to reverse the appellant's conviction on the grounds that property obtained from appellant's airplane as a result of an illegal and unconstitutional search and seizure in Grants, New Mexico, and an illegal and unconstitutional search and seizure in Liberal, Kansas was admitted into evidence?

2. Did the Court of Appeals err in failing to reverse the appellant's conviction on the grounds that an illegally and unconstitutionally obtained statement of the Appellant was admitted into evidence and thereafter used by the Court, sitting without a jury as trier of fact as a specific basis for finding that two of the necessary requisite elements of the crime charged in the indictment, to wit: knowledge and intent, had been proved to its satisfaction beyond a reasonable doubt?

IV. Constitutional Provisions and Statutes Involved

This case involves the Fourth Amendment to the United States Constitution (U.S.C.A. Const. Amend. IV, p. 361), the Fifth Amendment to the United States Constitution (U.S.C.A. Const. Amend. V, p. 4), and the Sixth Amendment to the United States Constitution (U.S.C.A. Const. Amend. VI, p. 4), and Title 21 of the United States Code,

Section 841(a)(1). These constitutional amendments and statutory provisions are set out in the Appendix hereto.

V. Statement of the Case

The basis for Federal jurisdiction in the Court of First Instance was that appellant was criminally charged with violation of United States Statutes, namely, 21 U.S.C. 960(a)(1); 21 U.S.C. 960(a)(2); 21 U.S.C. 841(a)(1); and 21 U.S.C. 844(a).

This is an appeal by the Appellant from the judgment of the United States Court of Appeals, 10th Circuit, unanimously affirming:

1. His conviction by a trial before the District Court for the District of Kansas, Hon. Frank C. Theis, presiding, of the crime of "possession of marijuana with intent to distribute", in violation of 21 U.S.C. 841(a)(1).

2. The order of the District Court, entered May 30, 1973, denying Appellant's motions to suppress real and oral evidence obtained by government agents from the Appellant.

3. The sentence thereinafter pronounced by the District Court, to wit; the sentence of October 3, 1973 committing the Appellant to the custody of the Attorney General for a period of five (5) years, to be eligible for parole at such time as the Board of Parole may determine pursuant to 18 U.S.C. 4208(a)(2); as well as imposing a special Parole Term pursuant to 21 U.S.C. 841(b)(1)(B) and subsection (c) of two (2) years.

The Appellant was arrested on July 24, 1972 at Liberal, Kansas. He was subsequently indicted on August 4, 1972 in the District of Kansas for the crimes of importation of

marijuana in violation of 21 U.S.C. 960(a)(1); possession of marijuana on board an aircraft in violation of 21 U.S.C 960(a)(2); possession of marijuana with intent to distribute in violation of 21 U.S.C. 841(a)(1); possession of a controlled substance with intent to distribute in violation of 21 U.S.C. 841(a)(1); possession of a controlled substance in violation of 21 U.S.C. 844(a).

The Appellant pled not guilty at his arraignment upon said indictment on August 4, 1972, Theis, D.J. presiding.

A hearing on Appellant's motion to suppress real and oral evidence obtained from the Appellant was held on February 16, 1973, Theis D.J. presiding.

The order denying Appellant's motions to suppress real and oral evidence was entered on May 30, 1973, Thies, D.J.

The Appellant was tried without a jury before Theis, D.J. on July 13, 1973. The government's motion to dismiss counts 1, 2, 4 and 5 of the indictment was then granted by the court. After trial, the court found Appellant guilty of count 3, violation of 21 U.S.C. 841(a)(1).

The Appellant was sentenced by the District Court, Theis, D.J. on October 3, 1973 to the sentence hereinbefore mentioned.

The conviction was unanimously affirmed by the United States Circuit Court of Appeals, 10th Circuit, on July 17, 1974.

VI. Statement of Facts Relevant to the Issues Presented For Review

On July 23, 1972, 5 federal customs agents in 2 airplanes followed the Defendant (a pilot of a Piper Cherokee 6) from Santa Monica, California to Grants, New Mexico where the Appellant's aircraft landed that afternoon due to heavy turbulance and storm activity. Said weather conditions made flying hazardous and imprudent for the next 12 to 15 hours. Thereafter, the 5 customs agents landed at Grants, New Mexico, and discovered the subject airplane to be tied down next to aviation gas pumps. The agents then learned from the airport operator that the Appellant had rented a room at a local motel for the night. Several hours after first landing, Agent Weatherman, without the consent of the Appellant, approached the subject aircraft, allegedly smelled what he believed to be a marijuana odor, opened the front compartment and seized a portion of the alleged subject contraband from the aircraft. Later, Agent Weatherman replaced the contraband and closed up the front compartment. The five agents, in two airplanes, were present in Grants, New Mexico during the entire 15 hour period of the Appellant's absence from the airport. The agents were able to obtain the use of an automobile to obtain food for themselves during their vigil of these more than fifteen hours; the subject airport was within eighty miles of a Federal Magistrate; yet, no effort was ever made by anyone of the 5 agents to obtain a search warrant for the subject airplane.

The Appellant next returned to the airport more than fifteen hours after he had first landed, and the agents allowed the Appellant to fly the subject aircraft away. The

Appellant then was allegedly followed to Liberal, Kansas where his plane landed and the Appellant alighted therefrom. The five agents, in their two aircrafts, followed the Appellant and also landed at Liberal.

Thereupon, one of the agents came up behind the Appellant on the airstrip and yelled the name "Barry", and immediately three other agents came up to where the Appellant was standing. Thereupon one of the agents asked, "What's in the plane?", and the Appellant allegedly stated, "the grass". Two agents held hand guns, and one agent had an M-1 carbine with a pistol grip, which was continually held upon the Appellant from the time the Appellant first saw the agent until the Appellant was placed in an aircraft to be taken to Wichita, Kansas for arraignment.

After the aforementioned statement, and while the guns were still being held on the Appellant, "Miranda" warnings allegedly were read to the Appellant, and thereupon, while the Appellant was taken to Wichita, the plane was again searched, without a search warrant or an arrest warrant, and the alleged contraband that formed the subject of the instant indictment was re-seized.

VII. Reasons Relied Upon For Allowance of Writ

1. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DECIDED THE QUESTION OF THE UNCONSTITUTIONAL SEARCH OF APPELLANT'S AIRPLANE, A FEDERAL QUESTION, IN A WAY WHICH IS IN CONFLICT WITH DECISIONS IN OTHER CIRCUIT COURTS OF APPEALS AS WELL AS APPLICABLE DECISIONS OF THIS COURT.

A. A Search of an Airplane Must Follow the Rules of a Search of a Premises or an Automobile.

An automobile is no more vulnerable to an incidental search, without a warrant than a private residence. (*People* v. *Zeigler*, 100 N.W., 2d 456). So must the airplane be in the instant case. The Court of Appeals stated that we are concerned here with a search of an airplane "which certainly is as mobile, if not more so, than an automobile . . . [T]he mobility of the thing searched in the instant case is a most significant factor in determining whether Weatherman's search of Sigal's aircraft was constitutionally permissible." (App. Page 10a)

The Court of Appeals seems to be saying that the word "airplane" is a talisman in whose presence the Fourth Amendment fades away and disappears. Such is not the law as will be set forth herein at length. Appellant had a proprietary interest in the airplane. However, the fact that a motor vehicle may, in general, be quickly removed from a jurisdiction has led the courts to allow officers to search motor vehicles without warrants when it would have otherwise been impracticable to obtain warrants. The same rule must apply, admittedly, to airplanes.

The United States Supreme Court in *Carroll* v. *United States*, 267 U.S. 132, 153; 45 S. Ct. 280, 285 said:

> ". . . . the guaranty of freedom from unreasonable searches and seizures . . . has been construed, . . . as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of an . . . automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly

> moved out of the locality or jurisdiction in which the warrant must be sought."

However, the rule of the *Carroll* case does not authorize warrantless searches of automobiles in the absence of "probable cause". The same must apply to airplanes. As the Supreme Court has said of the holding in *Carroll* v. *United States:*

> ". . . this does not mean, as seems to be assumed, that every traveler along the public highways, may be stopped and searched at the officers' whim, caprice or mere suspicion. . . . Those lawfully within the country, entitled to use the highways have a right to free passage without interruption or search, unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." (*Brinegar* v. *United States*, 338 U.S. 160)

B. A Warrant is Necessary to Search an Automobile Which is Not Mobile. So Must a Warrant Be Obtained to Make a Like Search of an Immobile Airplane.

Since the rule which permits an officer to search an automobile without a warrant is based on the ground that "it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought", it is clear that only mobile vehicles may be searched without a warrant. In any case where the vehicle is not mobile, as where the Defendant has already been taken into custody prior to the search and the car is parked in the street or in a garage, the police may not search the car without a search warrant.

That is the specific case here. In New Mexico, the officers had many hours in which to obtain a search warrant, but did not do so.

> "We are not here confronted with an arrest of defendant in his automobile. Neither are we confronted with a case where law enforcing officers find it necessary to make a search in a moving automobile or one which has been temporarily halted and which may be moved away by the occupant at any moment. The automobile here searched without a search warrant was not in movement and was not occupied by Defendant at the time of the search or at the time of his arrest. . . . Under these circumstances the search of his automobile was unreasonable. (*United States* v. *Stoffey*, 279 F. 2d 924, 929).

In Grants the Appellant was miles from the vehicle and asleep during the search. (See also on this point: *Husty* v. *United States*, 282 U.S. 694; *Hart* v. *United States*, 162 F. 2d 74; *Rent* v. *United States*, 209 F. 2d 893; *United States* v. *Kidd*, 153 F. Supp 605). Furthermore, the test for determining whether there is probable cause to support a warrantless search of an airplane is just as strict as that for probable cause for the issuance of a search warrant or for arrest without a warrant. (See: *Henry* v. *United States*, 361 U.S. 98, 102). Here, there is no doubt that this private airplane is a protected area. The Court of Appeals seems to say it is a less protected area than a house or auto. Counsel finds no law in support of that contention; if this be a case of first impression for this court, then the Court should hear it for that reason alone.

C. The Agents Herein Had No Probable Cause to Search the Subject Airplane; and While Odor of Contraband May, Along With Other Facts, Provide a Probable Cause, the Rule is That Such Information Be Submitted to Neutral and Detached Judicial Scrutiny and That a Warrantless Search Not Be Conducted.

In *U. S.* v. *Lewis*, 270 Fed. Sup. 807 the court stated "It would be a more desirable procedure for a commissioner before issuing a warrant to require proof of odor and the affiant's qualification to recognize the odor". In *Taylor* v. *United States*, 286 U.S. 1, 6, the Supreme Court stated, ". . . officers may rely upon a distinctive odor as a physical fact indicative of a possible crime; but its presence alone does not strip the owner of the building of constitutional guarantees against unreasonable search". A search should not be made without a warrant where the opportunity to obtain a warrant exists (*Harris* v. *U.S.*, 331 U.S. 145, 191 citing *Carol* v. *U. S.*, *supra*).

The record is replete with Weatherman's testimony that his only probable cause to search was the odor. *Taylor* held that odors alone do not authorize a search without a warrant. "If the presence of odors is testified to before a magistrate, and he finds the affiant qualified to know the odor and it is one sufficiently distinctive to identify a forbidden substance, this court has never held such a basis insufficient to justify the issuance of a search warrant. (The protection of the Fourth Amendment) consists in requiring these inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Any* assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will

justify the officer in making a search without a warrant would reduce the amendment to nullity and leave peoples' homes secure only in the discretion of police officers (Citing: *U. S.* v. *Lefkowitz*, 285 U.S. 452; and *Agnello* v. *U. S.*, 269 U.S. 20)." Here, the officers never attempted to secure a warrant of search.

They did not do so for they knew they had no probable cause; just odor. Before that fateful sniffing, Weatherman testified he had nothing that resembled probable cause; merely suspicion. *Taylor* says that odors alone do not authorize entry. It is obvious therefor that the judgment of the Court of Appeals is in direct conflict with *Taylor* and other cases as will be herein set forth.

The Court of Appeals cites *Cardwell* v. *Lewis*, U.S. (42 U.S.L.W. 4928, June 17, 1974) for the proposition that a search of an automobile is far less intrusive of 4th Amendment rights than the search of one's person or home.

Yet that is not the opinion of the majority, or of a plurality, but an opinion in concurrence by Mr. Justice Powell in *Almeida Sanchez* v. *U. S.*, 413 U.S. 266, 279. More importantly, the court in *Cardwell* states "This is not to say that no part of the interior of an automobile has 4th Amendment protection; the exercise of a desire to be mobile does not, of course, waive ones right to be free of unreasonable government intrusion. But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right of privacy that is the touchstone of our inquiry.

In *Cardwell* nothing from the interior of the vehicle was seized or introduced into evidence; merely, paint scrapings from the exterior.

Additionally there was abundant probable cause in *Cardwell.* Here there is none.

Unlike the defendant in *Cardwell,* the appellant did not have a mobile vehicle; there was no exigent circumstance; there was no incentive to remove the vehicle because of consciousness of guilt as in *Cardwell;* in fact, the appellant slept through the search and seizure.

Cardwell is not a case for the court to rely on in this instance.

D. A Warrantless Search May Be Made Only in a Few Specifically Established and Well Delineated Situations. These Situations Do Not Apply to the Case At Bar.

In *Aguilar* v. *Texas,* 378 U.S. 108 the Supreme Court stated: "Informed and deliberate determination of magistrates empowered to issue warrants are to be preferred over the hurried action of officers . . . who happen to make arrests". In *Chapman* v. *U.S.,* 365 U.S. 610 at 613, *citing Angello* v. *U.S., supra* at p. 32, the Supreme Court said "Belief however well founded that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. Such search is not unlawful, notwithstanding facts unquestionably showing probable cause". In *Vale* v. *U.S.,* 399 U.S. 30, 34 the court said "The Louisiana Supreme Court thought the search independently supportable because it involved narcotics which are easily removed, hidden or destroyed, but here . . . no one else was in the house. . . ."

Katz v. *U.S.,* 389 U.S. 347, 357 makes it clear that "only in a few specifically established and well delineated situations may a warrantless search of a dwelling withstand

constitutional scrutiny even though the authorities have probable cause to conduct it." The burden rests on the (Government) to show the existence of such an exceptional situation. *Chimel* v. *Calif.*, 395 U.S. 752; *U.S.* v. *Jeffers*, 342 U.S. 48, 51; *McDonald* v. *U.S.*, 335 U.S. 451, 456. Here, there was no suggestion of consent (*Zap* v. *United States*, 328 U.S. 624, 628) . . . Officers were not responding to an emergency (*U.S.* v. *Jeffers*, *supra* and *McDonald* v. *U.S.*, *supra*) . . . were not in hot pursuit of a fleeing felon (*Warden* v. *Hayden*, 387 U.S. 287, 289; *Chapman* v. *U.S.*, *supra* at 615; *Johnson* v. *U.S.*, 333 U.S. 10) . . . The goods were seized not in the process of destruction (*Schmerber* v. *Cal.*, 384 U.S. 757, 770-71; *U.S.* v. *Jeffers*, *supra*; *McDonald* v. *U.S.*, *supra*) . . . nor were they about to be removed from the jurisdiction (*Chapman* v. *U.S.*, *supra*; *Johnson* v. *U.S.*, *supra*; and *U.S.* v. *Jeffers*, *supra*).

Here, there is no possible claim under any of these exceptions. The case at bar stands "on all fours" within the law as described in *Vale* v. *U.S.*, *supra*, and therefor the Court of Appeals judgment must be reviewed and reversed.

E. The Search of the Appellant's Airplane Conducted by Customs' Agents at Grants, New Mexico Was Illegal.

It is the Appellant's contention that any search made at Liberal Kansas was the product of information received through a prior illegal search at Grants, New Mexico of the same subject aircraft. Therefore, it is submitted that when the Court finds the Grants, New Mexico search as illegal, the Court must, as a matter of course, suppress all evidence seized in this case. (*Wong Sun* v. *U.S.*, 371 U.S. 471, *Silverthorne Lumber Co.* v. *U.S.*, 251 U.S. 385).

The testimony of Agent Weatherman is very specific on the points raised in VI D herein. Obviously, there was no consent, for the Appellant was not near the aircraft when the search took place. The agents did not have a search warrant for the airplane (Record on appeal Page 125 inclusive of lines 2 and 3).

> "Q. Did you have a search warrant for it? A. No sir, I did not."

The officers were not in pursuit of a fleeing felon (Record on appeal, Page 126, lines 5 to 8).

> "Q. (By Mr. Kalina) Was Mr. Sigal fleeing from you at this time, that you made this search? Were you stopping a fleeing felon? A. No sir, I wasn't."

The goods seized were not in the process of destruction (Record on appeal, Page 126, line 13 to 16).

> "Q. Were those goods that were in the front of the plane, that alleged contraband, were they in the process of being destroyed? A. No, sir, they weren't."

The goods were not about to be removed from the jurisdiction (Record on appeal, Page 126, lines 17 and 18).

> "Q. Was Mr. Sigal removing them from the jurisdiction? A. Not to my knowledge."

Additionally, the officers were not responding to an emergency. Agent Weatherman in his testimony would have the Court believe that he was responding to an emergency. (Record on appeal, page 125, line 8 to page 126, line 4).

"Q. Were you responding to any kind of an emergency by searching the plane? A. In my estimation; yes sir, I was.

Q. Really? A. Yes.

Q. What emergency were you responding to? A. I had no idea when Mr. Sigal was going to return, or how many people he was going to return with.

Q. Was this an emergency? A. To me it was.

Q. He was under observation for two or three weeks, is that not correct? A. Yes sir.

Q. At no point, up to that point, did you think there was an emergency, did you? A. No sir, sure didn't.

Q. And it was such an emergency that you let him take off the next morning when you knew there was marijuana in the plane didn't you? A. Yes sir.

Mr. Kalina: I just want the Court to know what kind of an emergency it was."

It is respectfully submitted that under the guidelines set forth in *U.S.* v. *Jeffers*, *supra* and *McDonald* v. *U.S.*, *supra* that this was not an emergency situation at all. Agent Weatherman's specious statement (Record on appeal, Page 125, lines 14-15) "I had no idea when Mr. Sigal was going to return, or how many people he was going to return with," is not sufficient basis to warrant an emergency. If Mr. Sigal was not at the airport; if Mr. Sigal was, in fact, at a motel; if, in fact, the agents had no knowledge that Mr. Sigal was armed; if the agents had no idea whether Mr. Sigal was aware of the presence of agents at the airstrip; if the weather was to hazardous for flying then these circumstances certainly do not amount to an emergency situation. The physical facts contradict the agent's testimony and

the Court's rationale for finding "exigent" circumstances. As pointed out in the testimony, it was such an emergency that Mr. Sigal was allowed to take off the next morning. Here, we have five agents in two airplanes with a magistrate eighty miles away at most, and at least nine and as many as fifteen hours to obtain his signature on a warrant. The agents made not the slightest move to get a warrant, but decided to take the law into their own hands, and not submit their information to neutral and detached judicial scrutiny. *U.S.* v. *Lewis, supra; Taylor* v. *U.S., supra.*

The Supreme Court has held that a search should not be made without a warrant where the opportunity to obtain a warrant exists. *Harris* v. *U.S., supra; Carroll* v. *U.S., supra.*

Weatherman testified he had no probable cause to believe that a crime was being committed at any time prior to the smelling operation at Grants, New Mexico. He was not afraid that Mr. Sigal would flee the jurisdiction (Record on appeal, page 126, lines 17 & 18),

> "Q. Was Mr. Sigal removing them from the jurisdiction? A. Not to my knowledge."

He did not believe that the goods were being destroyed or that Mr. Sigal was a fleeing felon up until the time he went to the plane in Grants, New Mexico. Whereupon, miraculously with one sniff, he becomes fearful that Mr. Sigal might return with other persons to the plane. Is this an emergency?

The facts in the case do not warrant such a finding. In fact, after allegedly smelling this odor of marijuana and opening the aircraft and searching it without a warrant, several agents proceeded to leave the airport to obtain food to sustain them through their vigil.

The only emergency in this case is that the agent felt he was in an emergency situation when testifying in court, and had to attempt to come up with some basis for the search at Grants, New Mexico. The search is baseless under all decisions hereinbefore spoken of the Supreme Court of the United States and for that reason alone the judgment of the Court of Appeals must be reversed.

F. All Cases Relied Upon By the Court of Appeals in Affirming the Trial Court's Denial of the Appellant's Motions to Suppress Real and Oral Evidence are Either Inapplicable to the Case at Bar, Are Distinguishable from the Case at Bar or Actually Support the Defendant's Positions Herein.

The District Court in its order denying the Appellant's motion to suppress evidence herein relies on the cases of *U. S.* v. *Miller*, 460 F.2d 582; *U. S.* v. *McCormick*, 468 F.2d 68 and *U. S.* v. *Anderson*, 468 F.2d 280 The court compared the situations in those cases with the instant case and found them "on point". The Appellant respectfully points out to this Court that there is one large difference between those cases relied upon by the Court of Appeals and the case at bar; this is, in all cases relied on by the lower court the vehicle was mobile. In *Miller* the vehicle was stopped after leaving a state park with the driver inside. The same holds true in *McCormick* and *Anderson;* all moving vehicles.

Obviously, the Tenth Circuit Court in *Miller, McCormick* and *Anderson* relied upon the rationale set forth in *Coolidge* v. *New Hampshire*, 403 U.S. 443 and reaffirming the holding in *Chambers* v. *Maroney*, 399 U.S. 42 that the police may make a *legal contemporaneous search* of the vehicle *stopped* by police officers. That is not our case here. If the court were

to hold that it is the case here then the necessity for a search warrant to search any vehicle would be completely obviated. Obviously, that cannot be the holding here. The appeals court states that retrospectively it appears that one of the surveilling agents could have obtained a search warrant; that counsel has 20/20 hindsight. Yet, the court excuses this failure and holds the search valid nonetheless. The Appellant strongly disagrees.

The principles outlined in *Chambers* v. *Maroney, supra* and *U. S.* v. *Miller, supra, U. S.* v. *McCormick, supra,* and *U. S.* v. *Andersen, supra do not apply to the case at bar. Coolidge* v. *New Hampshire, supra,* decided one year after *Chambers,* strictly limits *Chambers* to its facts and reaffirms the principles set down in *Katz* v. *U. S., supra.*

In *Coolidge,* the court held that the holding in *Chambers* is limited to a legal *contemporaneous* search, pursuant to the definition of same in *Carroll* v. *U. S., supra.* Only in these circumstances may the police seize the car and take it to the police station and search it there. Note, however that the procedure was strictly proscribed; the vehicle must be taken to the "station". Here, there was not even a contemporaneous search, as in all cases relied upon in the District Court.

As was stated by the court in *Coolidge*:

> "The second theory put forward by the State to justify a warrantless seizure and search of the Pontiac car is that under *Carroll* v. *United States, supra,* the police may make a warrantless search of an automobile whenever they have probable cause to do so, and, under our decision last Term in *Chambers* v. *Maroney, supra,* whenever the police may make a legal *contemporaneous* search under Carroll, they may also seize the car, take it to the police station,

and search it there. But even granting that the police had probable cause to search the car, the application of the *Carroll* case to these facts would extend it far beyond its original rationale. *Carroll* did indeed hold that 'contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant,' provided that 'the seizing officer shall have reasonable or probable cause for believing that the automobile which he *stops* and *seizes* has contraband liquor therein which is being illegally transported.' Such searches had been explicitly authorized by Congress, and, as we have pointed out elsewhere, in the conditions of the time '[a]n automobile . . . was an almost indispensable instrumentality in large-scale violation of the National Prohibition Act, and the car itself therefore was treated somewhat as an offender and became contraband.' In two later cases, each involving an occupied automobile stopped on the open highway and searched for contraband liquor, the Court followed and reaffirmed *Carroll*. And last Term in *Chambers*, supra, we did so again. The underlying rationale of Carroll and of all the cases that have followed it is that there is 'a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where *it is not practicable to secure a warrant* because (emphasis supplied) the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought'. 267 U.S. at 153, 69 L. Ed at 551, 39 ALR 790. (Emphasis supplied).

As we said in *Chambers, supra*, at 51, 26 L. Ed. 2d at 428, 'exigent circumstances' justify the warrant-

> less search of 'an automobile *stopped on the highway*' where there is probable cause, because the car is 'movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." [T]he opportunity to search is *fleeting*. . . ." (Emphasis supplied) . . .

Here, there was ample time to obtain a search warrant.

Here, there was no fleeting opportunity to search the "vehicle". It *was practicable* to secure a warrant. None was secured. No attempt was even made.

The question then is whether Agent Weatherman could have made a legal contemporaneous search of the vehicle under *Katz* and *Coolidge*. The answer is a resounding no.

Weatherman did in fact conduct an exploratory warrantless search.

As the courts stated in *Coolidge*:

> "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll* v. *United States*—no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stole goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant,' *Carroll*, *supra*, at 153, and the 'automobile exception,' despite its label, is simply irrelevant."

In a case strikingly similar to the case at bar, the Court of Appeals in *United States* v. *Payne*, 429 F. 2d 169 (CA9 1970) struck down the search.

> "In that case, two couples were camping in an individually allotted campsite in Yosemite National Park. During the evening, an off-duty policeman camping with his family in an adjoining site observed the two couples smoking a substance he believed to be marihuana and also observed them making what he thought 'furtive' movements to remove objects he thought to be drugs from the glove compartment of a car parked nearby. He summoned a park ranger, and the two entered the campsite. They found that one of the couples was preparing to bed down for the night, while the couple to whom the car belonged were visiting in another campsite. The officers searched the unoccupied parked automobile, found 12 seconal capsules, and arrested the couple who had stayed behind. The Government attempted to uphold the search under *Carroll* supra, and *Brinegar*, supra. The Court of Appeals answered:
>
> "While it is true that the Supreme Court has enunciated slightly different rules concerning a search of an automobile without a warrant, the rationale is apparently based upon the fact that a 'vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought'. *Chimel* v. *California* (*supra*) . . . In the instant case the search of the Volkeswagen cannot be justified upon this reasoning. There is no indication in the record that the appellant or any of his party were preparing to leave, and quite to the contrary it is clear that appellant was bedding down for the evening and that there was ample time to secure the necessary war-

> rant for the search of the car had [the Park Ranger] believed there was probable cause to seek one." 429 F2d, at 171-172.

The conclusion is inescapable that the 9th and 10th Circuit Courts are in open conflict, one that must be resolved by this court.

Here, the agents knew Sigal had bedded down for the night. He had landed due to very poor flying weather. (Record on appeal Page 101, lines 24 to 25).

> (By Mr. Kalina)
>
> "Q. Did it rain that night in Grants? A. Yes sir, it sure did."

(Record on appeal, Page 103, lines 1-2).

> (By Mr. Kalina)
>
> "Q. Would it be safe procedure to fly in it? A. No, sir."

and again (Record on appeal, page 103, line 13).

> "A. No sir, I wouldn't have flown through that rainstorm."

The Agents knew Sigal had gone to a motel. (Record on appeal Page 103, lines 17-18)

> "Q. You knew Mr. Sigal was going to a motel didn't you? A. That is what the airport manager told me."

The Defendant's position can best be upheld by the testimony of Agent Weatherman (Record on appeal Page 50, line 21 to Page 51, line 4).

> "A. At this time I didn't want to stay around the aircraft very long for fear of Mr. Sigal seeing me for

> the second or third time, and so I parked my aircraft where it couldn't be seen, and then approximately an hour and a half to two hours later, yes sir, I did. I went up to the aircraft for a closer examination of the aircraft when it became apparent that Mr. Sigal was not going to come back to the airport shortly, or it appeared that he wasn't.

The court in *Coolidge*, rightly limited *Chambers* to its facts:

> "*Chambers*, *supra*, is of no help to the state, since that case held only that, where the police may stop and search an automobile under *Carroll*, they may also seize it and search it later at the police station. Rather, this case is controlled by *Dyke* v. *Taylor Implement Mfg.*, 391 U.S. 216, supra. There the police lacked probable cause to seize or search the defendant's automobile at the time of his arrest, and this was enough by itself to condemn the subsequent search at the station house. Here there was probable cause, but no exigent circumstances justified the police in proceeding without a warrant. As in *Dyke*, the later search at the station house was therefore illegal."

Here the police did not stop and search a vehicle that they had suspicions about. Sigal stopped the plane himself and was far away, safely tucked into bed at a motel when the illegal governmental entry was made.

The court in *Coolidge* further stated:

> "no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible

> measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure. *Taylor* v. *United States*, (supra); *Johnson* v. *United States*, (supra); *McDonald* v. *United States*, (supra); *Jones* v. *United States*, 357 US 493, 497-498, 2 L Ed 2d 1514, 1518, 78 S Ct 1253; *Chapman* v. *United States*, (supra); *Trupiano* v. *United States*, 334 US 699, 92 L Ed 1663, 68 S Ct 1229."
>
> "Where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches "per se unreasonable" in the absence of "exigent circumstances."

Here in the plainest language, the court, one year after *Chambers*, reaffirms all prior rulings so that there can be no misunderstandings about the legal requisite search in a situation such as at bar here. The court held, in *Coolidge*, that the seizure was unconstitutional; as were the fruits of the poisoned tree.

> "The seizure was therefore unconstitutional, and so was the subsequent search at the station house. Since evidence obtained in the course of the search was admitted at *Coolidge's* trial, the judgment must be reversed and the case remanded to the New Hampshire Supreme Court. *Mapp* v. *Ohio*, 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684, 84 ALR 2d 933."

Here there was no emergency. The weather for Sigal and for the agents that night in Grants was the same. How

could it have been too bad for the agents to fly 80 miles to get a warrant yet be good enough for Sigal to flee in? The Court of Appeals as well as the trial court has refused to observe one glaring physical fact; the weather. Both courts state that the agents are to be excused from seeking a warrant of search in Albuquerque because of bad weather. They could not fly; hence they were unable to even try.

Yet it seems that the bad weather that forms the excuse for failing to attempt to obtain a search warrant for the agents somehow miraculously is clear weather enabling the appellant to fly away at any time.

Did Sigal have the power of Moses to part the storm clouds and fly away, only to close them to the pursuing agents?

Why were the physical facts ignored by the Court of Appeals? Their decision is based on glaring error of fact.

As in *Coolidge*, the procedure here was unconstitutional.

Chambers may be limited by its own language:

> "On the facts before us, the blue station wagon could have been searched on the spot when it was *stopped* since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained. The same consequences may not follow where there is unforeseeable cause to search a house. (Compare *Vale* v.

> *United States, supra.*) But as *Carroll*, supra, held, for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars."

What is meant is a *moving* vehicle. Here, we have no moving vehicle. So the reason for the rule is obviated.

The rationale of *Chambers* is one of the probability of flight and loss of the subject vehicle which the police suspected had guns and stolen money and the *occupants in control of it.* Also, the police were suspicious of this before. They stopped the car and it was for this reason, among others, that the car was stopped. The only alternative there would have been to let the car go. That is not our case. Appellant had no control over the airplane. For the foregoing, seizure in this case must fall and the Court of Appeals' judgment must be reviewed and reversed.

2. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DECIDED THE QUESTION OF ADMISSABILITY OF THE DEFENDANT'S STATEMENT, A FEDERAL QUESTION, IN A WAY WHICH IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

It is obvious from the testimony of Agent Weatherman and from the testimony of the three young employees at Liberal Kansas airport that any statement Mr. Sigal made was at gun point, under duress, and is inadmissible as a matter of law under the Fifth and Sixth Amendments to the United States Constitution. The agent would have the court believe that Mr. Sigal responded "the grass" when asked initially what was in the plane. At the time Mr. Sigal got out of the plane at Liberal Kansas, the agent, through his illegal search, believed Mr. Sigal had committed

a crime of possession of marijuana. (Record on appeal Page 76, Lines 23 to Page 77 Line 11).

> "Q. You knew in your own mind that there was marijuana in the plane, did you not? A. Yes sir.
>
> Q. Okay, You knew that because you searched it the night before in Grants? A. No sir, I did not search the aircraft.
>
> Q. Did you take out a bag the night before from the front of the plane and find 20 pounds of marijuana as you testified? A. I opened the front baggage compartment.
>
> Q. And, you opened a box? A. Yes sir.
>
> Q. And that is not a search? A. Yes sir, it is."

The agent did not inform Mr. Sigal of his rights prior to any questioning. In fact, the alleged incriminating statement of "the grass" was made before any rights were given according to direct testimony of Agent Weatherman. (Record on appeal Page 65, Lines 15 to 25).

> "A. . . . And, he turned around. At that time I told him who I was. I identified myself as a Special Agent of the United States Customs. And I asked him what he had in his airplane.
>
> Q. What did he say? A. At this time Mr. Sigal replied that he had "grass" in there.
>
> Q. What happened next? A. Agent Shockley, who was standing beside me, by this time told Mr. Sigal he was under arrest, and advised him of his constitutional rights."

Therefore, even without the question of coercion, the court must find that the Appellant (whom the agent believed had committed a crime) was questioned, albeit one question, without advising him of his constitutional rights. This invoked the very answer, "the grass," that the court

used as a basis to find "probable cause," "knowledge" and "intent."

Under all the facts and circumstances of the incident, the Court must find that any statement made by Mr. Sigal at Liberal is inadmissible as being involuntary and being made under duress.

The Court of Appeals states (app. page 14a). "Any possible error in connection with Sigal's statement at the time of his arrest that he had 'grass' in his plane, which under the circumstances is difficult to see, is harmless beyond reasonable doubt. Accordingly we need not here be concerned with whether the utterance was voluntary, or made under duress. Independent of this one word utterance is overwhelming evidence that Sigal did in fact possess 445 pounds of marijuana. And the quantity involved permits the inferences that he possessed marijuana with an intent to distribute it."

The Appeals court totally disregards the fact that the Trial Court did not use that inference to find knowledge and intent.

The enormity of the Court's error in admitting the statement "the grass" is best illustrated in the verdict of the court upon the trial of this action (volume 3, page 15, lines 2-7).

> ". . . And, of course, the quantity of it, and, of course, the Court has already overruled the motion to suppress the statement. He admitted—he apparently said it was, "Grass", which the Court would take to show his intent that he knew that he was carrying the stuff."

Obviously the Court relied upon the Appellant's statements, solely, as indicating knowledge and intent, requisite elements needed to be proved by the government in order to have the trier of the facts find the Defendant guilty. The statement should not have been admitted into evidence and the conviction therefore must be reserved.

3. THE CASE INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT WHICH SHOULD BE SETTLED BY THIS COURT, AS FOLLOWS:

(a) Is an airplane a protected area under the Fourth Amendment? If so, is an airplane a less protected area than an automobile because of its potential range and speed?

(b) Is probable cause to believe contraband is in an immobile airplane sufficient to permit a search without a warrant?

(c) Is the presence of contraband on an immobile airplane "exigent circumstances" per se?

(d) Is odor of contraband alone sufficient to form the basis for probable cause?

(e) Can an appellate court find that requisite elements of a crime have been proven beyond a reasonable doubt by inferences in the record when the trial court, sitting as trier of the facts, specifically found those requisite elements proven by use of a constitutionally impermissable statement of the defendant?

The issues herein raised are spoken of at length in Section VI (1 and 2) herein and to set forth same here at length would be duplicatous. These issues are of first impression and should be decided by this court.

4. THIS COURT'S POWER OF SUPERVISION IS CALLED FOR IN THIS CASE BECAUSE THE TRIAL COURT SO DEPARTED FROM THE ACCEPTED COURSE OF FEDERAL PROCEEDINGS BY:

(a) Admitting into evidence alleged contraband that was illegally seized in violation of the 4th Amendment to the United States Constitution

(b) Admitting into evidence statements of the Defendant that were obtained in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution

(c) Finding the Defendant guilty by admitting into evidence the aforementioned illegally obtained alleged contraband, and by using the aforementioned illegally obtained statement to specifically find that the defendant knew he possessed contraband and that he intended to possess contraband.

VIII. Conclusion

Wherefore, petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit, in the above-entitled case.

Respectfully submitted,

ROBERT I. KALINA
Attorney for Defendant

OWEN J. REDMOND
CHRISTOPHER REDMOND

Of Counsel

Appendix A—Table of Amendments

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (U.S.C.A. Const. Amend. IV, p. 361)

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (U.S.C.A. Const. Amend. V, p. 4)

Amendment VI—Jury Trial for Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (U.S.C.A. Const. Amend. VI, p. 4)

Appendix B—Statute

21 USCS § 841. Prohibited Acts A—Penalties

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Appendix C—Opinion of the United States Court of Appeals

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 73-1934

Appeal from the United States District Court
for the District of Kansas

(D.C. W-CR-1535)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BARRY SIGAL, a/k/a Barry Edwards,
a/k/a David Allen Spector,

Defendant-Appellant.

Stephen K. Lester, Assistant United States Attorney, (Robert J. Roth, United States Attorney, on the brief), for Plaintiff-Appellee.

Robert I. Kalina (Christopher Redmond, on the brief), for Defendant-Appellant.

Appendix C—Opinion of the United States Court of Appeals

Before LEWIS, Chief Judge, and McWILLIAMS and BARRETT, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is a search and seizure case. Barry Sigal was convicted in a trial to the court of unlawfully possessing 445 pounds of marijuana with an intent to distribute in violation of 21 U.S.C. § 841(a)(1). Prior to trial, Sigal filed a motion to suppress the use upon trial of the 445 pounds of marijuana obtained by United States Customs Agents from his airplane in Liberal, Kansas, on the grounds that such was obtained in an unlawful search and seizure. Also, Sigal sought to suppress the use upon trial of certain statements he made to the arresting agents at the Liberal, Kansas, airport on the grounds that such had been made under duress and prior to the time he had been advised of his constitutional right to remain silent. After an extended evidentiary hearing, the trial court denied the motion to suppress.

When the matter came on for trial, Sigal waived his right to jury trial and the case was tried on the basis of various stipulations, which included the right of the trial court to consider the testimony given at the hearing on the motion to suppress. No other evidence was offered by either side. Based, then, on such evidentiary matter, the trial court found Sigal guilty of having violated 21 U.S.C. § 841(a)(1). Sigal now appeals his conviction, and we affirm.

The principal matter on appeal is whether the Government obtained the 445 pounds of marijuana from Sigal's airplane at the Liberal, Kansas, airport in a search and

seizure which had been tainted by a prior unlawful intrusion. Our study of the matter leads us to conclude that the search and seizure was a lawful one, even though no search warrant had ever been issued, because the search and seizure was based on probable cause under exigent circumstances which obviated any necessity to obtain a search warrant. The facts as developed at the hearing on the motion to suppress will be summarized briefly in order to give meaning to our conclusion.

Barry Sigal crossed the border into the United States from Mexico at El Paso, Texas, under circumstances which aroused the suspicion of the Customs Inspector. Among other things, Sigal tried to "palm" a key bearing a tag marked "N4270T." The inspector related the circumstances of Sigal's entry to one Jerald G. Weatherman, a special agent for the United States Customs. Weatherman was the only witness called by the Government at the hearing on the motion to suppress and this recital is necessarily based, in the main, on his testimony. Sigal did not himself testify at the suppression hearing, though he did call three employees of the Liberal Airport, who testified concerning Sigal's arrest.

Armed with the information which he had acquired from the Customs Inspector, agent Weatherman went to the El Paso International Airport and located a Piper Cherokee-6 airplane bearing the number "N4270T." Four of the six seats inside the Piper had been removed and approximately 20 flattened-out cardboard boxes and two large boxes that were sealed occupied the space where the seats had been. Weatherman watched this plane until late in the evening, when he was relieved by another agent. Weatherman was

advised the following day by the agent who had relieved him that the Piper had taken off about 2:30 A. M. and was followed by Customs Agents to the airport in Wilcox, Arizona, where somehow the agents lost contact with the Piper

Shortly thereafter word was received that the Piper had landed in Holbrook, Arizona, and Weatherman proceeded at once to Holbrook where he observed the Piper bearing number N4270T. Weatherman testified that he saw Sigal enter the Piper and take off. Weatherman followed Sigal in a Government plane to Long Beach, California. Weatherman was then called off the case.

About ten days later, Weatherman was contacted in El Paso by another Customs agent who informed him that numerous boxes had been loaded into Sigal's plane in Los Angeles, and that Sigal's plane had then taken off with a Customs aircraft in pursuit. Weatherman, as requested, took off in another Government plane and made visual contact with Sigal's plane and the other Customs aircraft near Holbrook, Arizona. The two Customs planes followed Sigal's airplane as it apparently headed towards Albuquerque, New Mexico. However, before reaching Albuquerque, Sigal's plane turned sharply to the left and landed at Grants, New Mexico, some ninety miles west and north of Albuquerque. The Customs planes maintained aerial surveillance for about an hour and then, when it became obvious that Sigal had landed for something other than refueling, they too landed. What happened thereafter in Grants, New Mexico, is of paramount importance.

Upon landing in Grants, Weatherman learned from airport employees that although Sigal had gone to a local motel, "he said he would be back as soon as it [presumably

the plane] got cool." At this time Weatherman looked inside the suspect aircraft and saw numerous large cardboard boxes. Upon an inspection around the air vents, Weatherman detected what he described as the "strong odor of marijuana." After revealing this fact to a fellow agent, Weatherman checked the door of the aircraft, which he found to be locked. However, upon further investigation, he found the front baggage compartment to be unlocked. Weatherman testified that he then opened this compartment, reached inside and opened one of the large cardboard boxes which had been sealed with masking tape. Inside the box Weatherman saw that which he believed to be some 20 pounds of marijuana. He later resealed the cardboard box and closed the baggage compartment. Weatherman and his fellow agent then waited for Sigal to return to his plane.

Sigal did not return to his plane until early the following morning, when it was just beginning to get light. Sigal then took off, followed shortly thereafter by the Government planes.

Sigal next flew to Liberal, Kansas, where he landed his plane. The Government planes landed very shortly thereafter. Sigal got out of his plane and was thereupon arrested by the Customs agent. Weatherman testified that he identified himself as an agent and inquired as to what was in the plane, to which Sigal replied, "grass." Weatherman then asked if he could have the key so as to search the Piper, to which inquiry Sigal stated that the aircraft was unlocked. Weatherman thereupon searched the Piper and removed cardboard boxes containing some 445 pounds of marijuana.

Appendix C—Opinion of the United States Court of Appeals

As indicated, Sigal did not testify at the hearing on the motion to suppress, though he did call as witnesses three employees from the Liberal, Kansas, Airport. Each testified as to what he saw and heard at the time of the arrest, with emphasis being made of the fact that at least some of the Customs agents drew their guns.

The main thrust of Sigal's search and seizure argument is that Weatherman's search of Sigal's plane in Grants, New Mexico, was an unlawful one, and that the subsequent search and seizure in Liberal, Kansas, was thereby rendered unlawful under the fruit of the poisonous tree doctrine. Wong Sun v. United States, 371 U.S. 471 (1963). Let us now analyze Weatherman's search of Sigal's plane in Grants, New Mexico.

Weatherman's search and inspection of Sigal's aircraft in Grants, New Mexico, was conducted without the sanction of a search warrant. However, the absence of a search warrant does not necessarily mean that Weatherman's search of Sigal's plane was unreasonable under the Fourth Amendment. Under the authorities, if Weatherman's search was in fact based on probable cause and if there existed exigent circumstances which made impractical and unreasonable the obtaining of a search warrant prior to conducting a search of Sigal's aircraft, then Weatherman's search was not itself unreasonable, and was lawful. Chambers v. Maroney, 398 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925); and United States v. Pollard, 466 F.2d 1 (10th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973). Before considering the issues of "probable cause" and "exigent circumstances," as such relate to the facts of the instant case, we do note that we are not here concerned

with a search of a home, but of an airplane, which certainly is as mobile, if not more so, than an automobile. The search of an automobile, for example, is far less intrusive on Fourth Amendment rights than the search of one's person or home. Cardwell v. Lewis, — U.S. —, 42 U.S.L.W. 4928 (June 17, 1974); and Almeida-Sanchez v. United States, 413 U.S. 266 (1973). Clearly, then, the mobility of the thing searched in the instant case is a most significant factor in determining whether Weatherman's search of Sigal's aircraft was constitutionally permissible.

Our study of the record leads us to conclude that Weatherman did have probable cause to search Sigal's aircraft in the airport at Grants, New Mexico. Weatherman knew of the suspicious circumstances under which Sigal crossed the border in El Paso, Texas. Weatherman then himself followed Sigal all over the southwest. The facts concerning Sigal's suspicious conduct prior to his flight from Los Angeles to Grants have not been detailed in this opinion, but they are in the record, and may of course be considered in our determination as to whether Weatherman had probable cause when he searched the plane in Grants, New Mexico. In the light of Sigal's prior suspicious conduct, any possible doubt as to probable cause was dispelled when, at the Grants airport, Weatherman detected the strong odor of marijuana emanating from the vents of Sigal's aircraft. Under such circumstances, Weatherman indeed had probable cause to believe that marijuana was in Sigal's aircraft. United States v. McCormick, 468 F.2d 68 (10th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); United States v. Miller, 460 F.2d 582 (10th Cir. 1972).

Appendix C—Opinion of the United States Court of Appeals

Counsel argues that even assuming the existence of probable cause, the search was an unlawful one inasmuch as there were no exigent circumstances which prevented Weatherman from obtaining a search warrant before searching the plane. It is agreed that the nearest available Magistrate was in Albuquerque, New Mexico, 90 miles distant from Grants. Counsel in this regard emphasizes that Sigal was in Grants, New Mexico, for approximately 15 hours before departing for Liberal, Kansas, which provided ample time for Customs agents to drive to Albuquerque and obtain a search warrant.

Much of counsel's argument on the lack of exigent circumstances is based on 20/20 hindsight. Based on all of the facts and circumstances, the trial court concluded that exigent circumstances did exist. We agree. In fact, the trial court's findings adequately sum up our views on the matter, and we repeat them here. In this connection the trial court commented as follows:

> "Probable cause by itself does not justify a warrantless search. In addition, there must be 'exigent circumstances' which preclude the securing of a warrant. The testimony shows that a period of as long as fifteen hours intervened between the time Agent Weatherman searched the baggage compartment and the time defendant departed the Grant-Milan airfield. Retrospectively, it appears one of the surveilling agents could have driven or flown to Albuquerque, some 160 miles round-trip distance, and procured a warrant. However, the Court is concerned with the facts and circumstances as they appeared to the agents at the time. The prime fact to be considered is the airplane which defendant was

> flying. An airplane is exceedingly mobile and can carry its pilot for great distances in any direction. Moreover, the agents had no inkling as to defendant's schedule, he could have returned and departed at any time. Secondly, the agents did not know if defendant was acting alone. Someone else could have appeared and either unloaded the plane or taken off. Consequently, the agents not only had to be concerned with the defendant, but also with the possibility of others appearing on the scene. Thus, they could not afford to disengage an agent or an airplane. Finally, there is the testimony as to the weather conditions that night. Apparently there were storms in the area which would have made flying hazardous. Combined, these facts and circumstances were of such exigency as to obviate the necessity for a warrant. Here, there is presented the classic case of law enforcement officials confronted with a highly mobile vehicle and complete uncertainty as to its future use or ultimate destination. These facts and circumstances likewise are well within the holdings in *Miller* and *McCormick*."

As indicated, in the main counsel challenges the presence of exigent circumstances. In this regard, with reference to the Government's lengthy surveillance of Sigal, any suggestion that exigent circumstances cannot be claimed at the time of the search in Grants because, well before that time, the agents were purportedly aware of probable cause sufficient to seek a search warrant, but did not do so, is fully answered in the Supreme Court's most recent automobile search case, *Cardwell* v. *Lewis, supra.* We agree with the following observation from Justice Blackman's plurality opinion: "Assuming that probable cause previ-

ously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment."

In sum, then, for the reasons set forth above, we conclude that Weatherman's search of Sigal's plane in Grants, New Mexico, was not offensive to the Fourth Amendment and that he could have, if he had been so inclined, seized the marijuana at the Grants airport and proceeded to arrest Sigal forthwith. The fact that he determined to continue the pursuit a bit further to see what developed does not render his search and inspection of Sigal's plane improper. Accordingly, what thereafter occurred at the airport in Liberal, Kansas, was not the fruit of any tree that had been poisoned in Grants, New Mexico.

Nor do we believe that Sigal's arrest in Liberal, Kansas, or the search of his plane at the airport in that city were themselves constitutionally infirm. For all the reasons set forth above, the Customs agents had ample probable cause to arrest Sigal without first obtaining a search warrant. And the ensuing search of his plane was justified under such authorities as *Chambers* v. *Maroney, supra; Carroll* v. *United States, supra;* and *United States* v. *Pollard, supra.*

To reiterate, we deem the search and seizure matter to be the real issue in this appeal. The other matters argued here are in our view minor and merit no particular mention. It should be remembered that this case was by agreement tried to the court on the basis, in the main, of testimony adduced at the hearing on the motion to suppress. At such hearing, there was no error in permitting Weather-

man to relate information which he had acquired from other Customs agents in determining the question of probable cause. *Cf. United States* v. *McCoy*, 478 F.2d 176 (10th Cir. 1973), *cert. denied*, U.S. , 42 U.S.L.W. 3195 (Oct. 9, 1973). Nor was there any error at the hearing on the motion to suppress in the trial court's refusing to let counsel inspect a report which Weatherman had not himself prepared, and to which he apparently referred for the limited purpose of refreshing his memory as to a proper name. Lastly, any possible error in connection with Sigal's statement at the time of his arrest that he had "grass" in his plane, which under the circumstances is difficult to see, is harmless beyond reasonable doubt. Accordingly, we need not here be concerned with whether the utterance was voluntary, or made under duress. Independent of this one word utterance is overwhelming evidence that Sigal did in fact possess 445 pounds of marijuana. And the quantity involved permits the inferences that he possessed the marijuana with an intent to distribute it. *United States* v. *King*, 485 F.2d 353 (10th Cir. 1973).

Judgment affirmed.

Appendix D
Order of the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

FILED
May 30 1973

ARTHUR G. JOHNSON, Clerk
By JACK CRAWLEY, Deputy

Case No. W-CR-1501

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BARRY SIGAL, a/k/a Barry Edwards,
a/k/a David Allen Spector,

Defendant.

ORDER DENYING DEFENDANT'S
MOTION TO SUPPRESS EVIDENCE

The defendant herein is charged by indictment with the importation and possession of 445 pounds of marijuana, in violation of 21 U.S.C.A. §960(a). He is charged, in addition, with possessing the marijuana with intent to distribute, in violation of 21 U.S.C.A. §841(a)(1). Finally, he is charged both with possession with intent to distribute in violation of 21 U.S.C.A. §841(a)(1), and with possession,

in violation of 21 U.S.C.A. §844(a), of a quantity of cocaine. All five counts arise from one series of events which culminated with his arrest by agents of United States Customs on July 24, 1972. Presently before the Court is defendant's motion to suppress all evidence seized by the customs agents at the time of his arrest. Having examined the testimony of the various witnesses and the authorities cited, the Court makes the following findings and orders.

Any inquiry into the validity of a search and seizure must start with the fundamental proposition that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). One exception to the warrant requirement was first recognized in *Carroll* v. *United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 453 (1925). In that case, the Supreme Court recognized an intrinsic difference for Fourth Amendment purposes between structures such as dwellings and highly mobile vehicles such as automobiles, and held that a warrantless search of a vehicle may be conducted when the seizing officer has probable cause to believe the vehicle is carrying contraband, although under similar circumstances the search of a dwelling would require a warrant. In a later decision, the Supreme Court affirmed the decision in *Carroll*, noting that an automobile may not be searched without a warrant in every circumstance. However, since an automobile is readily movable, if an effective search is to be made either the search must be immediately made or

the vehicle seized. For constitutional purposes, the Court found no difference between an immediate search without a warrant and seizing and holding the vehicle for a subsequent search, both require probable cause. Accordingly, the Court upheld a warrantless search of a vehicle after it had been removed to the police station. *Chambers* v. *Moroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970). The rationale given was that there were exigent circumstances preventing an immediate search and so long as probable cause still obtained, the warrantless search was not illegal.

In several recent decisions the Tenth Circuit Court of Appeals has had occasion to apply the *Carroll-Chambers* exception to factual settings akin to that presented in this case. The lead case is *United States* v. *Miller*, 460 F.2d 582 (10th Cir. 1972). There, border patrol agents first discovered three large duffel bags hidden adjacent to a state park from which they identified the odor of marijuana. They then conducted a surveillance stakeout of the park. Shortly after discovery of the bags, a customs agent stopped two trucks, a Ford van and a Chevrolet pickup, in which three of the defendants were riding. In the course of a search of one of the vehicles, he discovered three marijuana seeds. He then notified other agents and the U. S. Border Patrol of the incident and the description of the vehicles. Later that day, a self-contained mobile home entered the park. Three occupants left the mobile home and began searching for something in the west area of the park. Eventually they reappeared, carrying several bags, which they deposited near a road on the south side of the park.

Appendix D
Order of the United States District Court

Shortly thereafter the Ford van arrived and parked beside the mobile home. Later, four persons left the mobile home and walked south towards the Mexican border. They returned some two and one-half hours later carrying large bags. They joined four other persons who had left the mobile home and gone to the south side of the park where they appeared to the agents to be bundling something on the ground. Early the next morning both vehicles left the park. The agents pursued and stopped both vehicles. A search of the mobile home yielded 512 pounds of marijuana.

Viewing the circumstances as they would have appeared to prudent, cautious and trained police officers, the Court held the warrantless search of the mobile home reasonable under the totality of the facts and circumstances. The probable cause element was met by the detection of the odor of marijuana emanating from the bag, combined with the suspicious activities of the defendants and the fact that the park area was ideally suited for smuggling activities. Among the exigent circumstances justifying the search, the Court noted that the number of persons involved was unknown; there were a continuing series of activities the ultimate duration of which was unknown; and there were two vehicles involved. Under these circumstances, the Court held a search warrant was unnecessary, although in retrospect one could have been obtained.

The next decision pertinent to this case is *United States* v. *McCormick*, 468 F.2d 68 (10th Cir. 1972). Two border patrol and U.S. customs inspectors stopped a vehicle in which the defendant was a passenger. Agent Ford saw a large black plastic bag in the rear of the truck and detected

the odor of marijuana from within the truck. The truck was directed to siding for inspection. The other officer reached in and felt an object under the plastic cover which he described to Agent Ford. Agent Ford then approached the rear of the vehicle, reached in, and in attempting to lift the bean-bag type plastic object, pulled out a paper-wrapped brick shaped object. He opened it and determined that it was marijuana. The two defendants were immediately arrested. A consequent search of the van yielded 1,400 pounds of marijuana. In sustaining the search, the Court found Agent Ford had probable cause to conduct the search based on the odor of marijuana, the suspicious behavior of the driver of the vehicle, his prior view of the large, plastic-covered object, and the description of the object felt by the other agent when he first reached under the object. With respect to the probable cause issue, the Court stated that "[A] border patrol agent who has learned how to identify marijuana by sight or by its odor has probable cause to search and seize and to effect arrests upon discovery of marijuana in a vehicle."

The latest decision is *United States* v. *Anderson*, 468 F.2d 1280 (10th Cir. 1972), per curiam. Again, the Court upheld a warrantless search of a vehicle which resulted in seizure of marijuana. In affirming the existence of probable cause, the Court noted one agent smelled marijuana and held that, together with other circumstances, this sufficed.

There are a number of factual parallels between this case and the decisions just noted. According to the testimony of Customs Agent Weatherman, the defendant first aroused

the interest of customs officials when he and a companion, Mr. Stewart, were searched after crossing the Mexican border on July 9, 1972. A hashish pipe and one marijuana cigarette were discovered in the possession of defendant's companion. In the defendant's possession, officers found maps and an aircraft key which he had attempted to conceal. The following day Agent Weatherman located the aircraft at a local airport. Inside the craft he saw some twenty folded cardboard boxes and two sealed boxes. A surveillance was maintained and on July 11, 1972, the aircraft departed and was followed as far as Willcox, Arizona, where contact was lost. Later that day the aircraft was relocated at Holbrook, Arizona, and the defendant was observed in the company of another man, tentatively identified as Stewart. They then took off and flew to Long Beach, California. After they landed they got in a red vehicle and departed. At the time the defendant's aircraft was parked at the airport in Holbrook, Arizona, Agent Weatherman had looked inside it and observed two ladders, two traverse rods, and a four-foot long mirror. When asked what such articles could be used for, he stated they could be used to set up an instrument landing system, and by employing this system airplanes could land on any presentable surface.

During the period from July 12, 1972 to July 23, 1972, defendant's airplane was presumably kept under surveillance by local agents. Defendant's plane was moved from Long Beach to Santa Monica, California. There it was loaded with boxes and on July 23, 1972, departed. Agents from Los Angeles, California, followed in their plane and were intercepted by Agent Weatherman and two other

agents in their aircraft near Holbrook. Subsequently, defendant landed at Grants-Milan Airport, near Grants, New Mexico. The agents circled the airport and one hour later landed.

After landing, Agent Weatherman learned from the fixed base operator that the defendant had gone to a nearby motel. He subsequently looked into defendant's plane and observed a number of sealed cardboard boxes. Approximately two hours later Agent Weatherman closely examined the defendant's aircraft and when he put his nose to the ventilation holes he smelled a strong odor of marijuana. Next, he opened the baggage compartment and discovered a cardboard box and a travel bag. Inside the cardboard box he found some twenty pounds of crude marijuana. Inspection of the travel bag disclosed several plastic bags of marijuana. The agents maintained surveillance throughout the night.

Early the next morning the defendant returned, entered his aircraft and took off, with the agents close behind. Defendant next landed at the Liberal, Kansas, airport. Because the agents did not care to risk losing the contraband, the decision was made to arrest the defendant immediately upon landing. Accordingly, the defendant was arrested and a subsequent search of his aircraft yielded some 444 pounds of marijuana. In addition, a post-arrest search of the defendant yielded .0721 grams of cocaine wrapped in foil and concealed in his wallet.

The defendant contends his arrest and warrantless search of his aircraft at the Liberal Airport following his arrest was illegal and the evidence seized should be sup-

pressed. Also, he contends the post-arrest search of his person was illegal. The facts in this case, with the notable exception of a considerable time lag between the initial search and the subsequent arrest and search, closely parallel the facts in *United States* v. *McCormick, supra.* The critical questions in this case are, first, whether Agent Weatherman had probable cause to search the baggage compartment and, second, whether there existed such exigent circumstances as would justify the failure to obtain an arrest warrant and a search warrant prior to defendant's arrest at the Liberal Airport. If both these questions can be answered affirmatively, then under the rule developed by the Tenth Circuit, the arrest and search were legal and the evidence seized admissible.

In determining whether probable cause existed, the Court must view the facts and circumstances as they would have appeared to prudent, cautious and trained police officers. First, there is defendant's initial appearance at the border in the company of a man who was discovered to have a hashish pipe and a marijuana cigarette in his possession. The defendant also acted suspiciously in attempting to hide the maps in his socks and to palm the airplane key. Second, there is Agent Weatherman's observation of materials in defendant's aircraft which he testified could be used to set up an instrument landing system. These two facts, together with other observations made in the course of their surveillance, indicated to the agents that some clandestine scheme was afoot, that is, it fit a known M.O. Subsequently, Agent Weatherman smelled a strong odor of marijuana emanating from within the plane. Agent Weather-

man testified he had smelled marijuana numerous times during his two years with the United States Customs. Considering these facts and circumstances *in toto*, the Court believes them to constitute probable cause for the subsequent searches and arrest. These facts and circumstances compare favorably with those noted by the Circuit Court in *Miller* and *McCormick*.

Probable cause by itself does not justify a warrantless search. In addition, there must be "exigent circumstances" which preclude the securing of a warrant. The testimony shows that a period of as long as fifteen hours intervened between the time Agent Weatherman searched the baggage compartment and the time defendant departed the Grant-Milan airfield. Retrospectively, it appears one of the surveilling agents could have driven or flown to Albuquerque, some 160 miles round-trip distance, and procured a warrant. However, the Court is concerned with the facts and circumstances as they appeared to the agents at the time. The prime fact to be considered is the airplane which defendant was flying. An airplane is exceedingly mobile and can carry its pilot for great distances in any direction. Moreover, the agents had no inkling as to defendant's schedule, he could have returned and departed at any time. Secondly, the agents did not know if defendant was acting alone. Someone else could have appeared and either unloaded the plane or taken off. Consequently, the agents not only had to be concerned with the defendant, but also with the possibility of others appearing on the scene. Thus, they could not afford to disengage an agent or an airplane. Finally, there is the testimony as to the weather conditions

that night. Apparently there were storms in the area which would have made flying hazardous. Combined, these facts and circumstances were of such exigency as to obviate the necessity for a warrant. Here, there is presented the classic case of law enforcement officials confronted with a highly mobile vehicle and complete uncertainty as to its future use or ultimate destination. These facts and circumstances likewise are well within the holdings in *Miller* and *McCormick*.

Therefore, the Court finds that Agent Weatherman, at the time he searched the baggage compartment, had probable cause to search it and, further, that there were exigent circumstances excusing the failure to obtain a warrant. This case, then, falls well within the scope of *McCormick*, wherein the Circuit Court upheld the validity of a search which turned up marijuana and was followed by arrests of the occupants of the vehicle and a search which disclosed a large quantity of marijuana. Also the Court finds that since the arrest was not illegal, the post-arrest search of defendant's person which yielded the cocaine, was also not illegal, and was within the scope of the search upheld in *Chimel* v. *California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969). Accordingly, defendant's motion to suppress is denied.

IT IS THEREFORE ORDERED that the defendant's motion to suppress the introduction of evidence seized from his airplane and person be, and the same is hereby, denied.

At Wichita, Kansas, this 30th day of May, 1973.

/s/ FRANK G. THEIS
United States District Judge